

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 26, 2005

IN RE:

PETITION OF UNITED TELEPHONE-SOUTHEAST,
INC. FOR DECLARATORY RULING

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DOCKET NO.
05-00152

INITIAL ORDER CONVENING CONTESTED CASE AND
GRANTING MOTION TO CONSOLIDATE DOCKETS

This matter came before the Hearing Officer to make a determination, prior to July 27, 2005, whether to set this matter for a contested case proceeding and upon the *Motion of United Telephone-Southeast, Inc to Consolidate Docket No. 05-00156 with Docket No 05-00152*.

BACKGROUND

On May 27, 2005, United Telephone-Southeast, Inc. ("Sprint") filed a *Petition for Declaratory Ruling* ("Petition") requesting a declaratory ruling, pursuant to Tenn. Code Ann. §§ 4-5-223 (1998) and 65-2-104 (2004) "as to the applicability of provisions of the Federal Communications Commission's ("FCC's") Triennial Review Order ("TRO")¹ to DS1 switching for the enterprise market." Specifically, Sprint asked for an order from the Authority finding:

That paragraph 451 and 47 C.F.R. § 51.319(d)(3) as set forth in the FCC's TRO Order (CC Docket 01-338) issued on August 21, 2003, eliminated the requirement for Incumbent Local Exchange Carriers ("ILECs") to provide DS1 switching for the enterprise market. [and]...Sprint no longer has an obligation to provide DS1 switching at Total Element Long Run Incremental Cost (TELRIC) based Unbundled Network Element (UNE) rates and may price these elements at market based prices.²

¹ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos 01-338, 96-98, 98-147, (Report and Order and Order on Remand and Further Notice of Proposed Rulemaking) 18 FCC Rcd 16,978 (August 21, 2003), corrected by Errata, 18 FCC Rcd 19,020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v FCC*, 359 F 3d 554 (D C Cir 2004) ("USTA II") cert denied, 125 S Ct 313, 316, 345 (2004) ("Triennial Review Order" or "TRO")

² *Petition*, p 1 (May 27, 2005)

According to Sprint, a ruling by the Authority on this issue is required because in the midst of negotiating a new interconnection agreement between Sprint and The Information Bureau, Inc. ("TIB"), the parties have reached an impasse over this issue. The *Petition* sets forth in detail the history of the dealings between the parties regarding provision of this service and contains Sprint's arguments supporting its interpretation of the TRO as eliminating the service as a TELRIC price-based element. Under the terms of the earlier interconnection agreement that expired on October 31, 2004, Sprint provided TIB a combination of an unbundled DS1 Loop and unbundled DS1 switching for the enterprise market. Sprint alleges that the negotiations have halted due to "TIB's refusal to accept the FCC's decision that DS1 switching is no longer available at TELRIC pricing."³ The parties are presently operating under the terms of the expired agreement on a month-to-month basis.

TIB filed a letter ("*TIB's Request for PUC Directive*") requesting a directive or order from the Authority requiring Sprint "to continue to honor their previous contract with TIB for PRI lines until there is a Final ruling from the Federal Courts and the FCC regarding UNE-P services."⁴ *TIB's Request for PUC Directive* was filed on June 3, 2005 and was assigned Docket No. 05-00156.

In lieu of a separate response to *TIB's Request for PUC Directive* in TRA Docket No. 05-00156, Sprint filed a letter on June 17, 2005 requesting that the Authority accept the positions set forth in its *Petition* as its response. In addition, Sprint filed the *Motion of United Telephone-Southeast, Inc to Consolidate Docket No. 05-00156 with Docket No. 05-00152* ("*Motion to Consolidate*") in both dockets, seeking consolidation of the two dockets because, according to

³ *Petition*, p. 2 (May 27, 2005)

⁴ *TIB's Request for PUC Directive*, p. 2 (May 19, 2005) This document is dated May 19, 2005 but was not docketed and a file was not opened until June 3, 2005 when the TRA received the requisite number of copies and filing fee

Sprint, both dockets involve the same issue for resolution by the Authority.

On July 11, 2005, TIB filed a letter providing a general outline and response for both dockets ("*TIB's Response*"). TIB asserts that the problem arises from the TRO and that in April 2004, the FCC ruled that an ILEC does not need to provide UNE-P products to a competitive local exchange carrier ("CLEC"). According to TIB, the original order was challenged in court and was reversed and, subsequently, a total of three orders were issued by the FCC and all were reversed. TIB further states that in October 2004, the FCC issued another order and, because it has been challenged in court, it is very possible that the court may reverse the FCC again. TIB asserts that after the FCC issued the first order in April 2004, Sprint increased UNE-P line charges by 70%. TIB states that, even though the FCC order was reversed by the court, Sprint has continued to bill TIB at the higher rate which TIB cannot afford. TIB is requesting the Authority to delay implementation of the FCC order until the court gives a final ruling. TIB suggests that another option is for the Authority to direct both the ILEC and CLEC to continue UNE-P rates at (1) the current contractual arrangement; (2) at \$1 premium per month as directed by the FCC order; or (3) to set a small monthly premium (such as 15%) until a final decision is made by the FCC and approved by the courts.

At a regularly scheduled Authority Conference held on July 11, 2005, the panel assigned to this docket voted unanimously to appoint a Hearing Officer to determine, prior to July 27, 2005, whether to set this matter for a contested case proceeding. If such a hearing were set, the Hearing Officer was directed to (1) resolve any preliminary matters, including the motion to consolidate; (2) prepare the matter for hearing by the panel; and (3) prepare and send out a notice

in accordance with Tenn. Code Ann. § 4-5-224 (1998).⁵ The panel set a deadline of Monday, July 18, 2005 for TIB to file a response to Sprint's *Petition* and the *Motion to Consolidate*, if it desired to respond, and a deadline of Friday, July 22, 2005 for Sprint to file a reply.⁶

On July 18, 2005, TIB filed a letter ("*TIB's Modified Response*"), which reiterated the points made in its July 11, 2005 letter. TIB further suggested that "if, after the final order by the FCC an ILEC or CLEC owes money to the other, then the debt can be satisfied at that time."⁷

On July 20, 2005, Sprint filed a letter with the Authority seeking to clarify that it is only requesting a declaratory ruling concerning its obligation to sell DS1 enterprise switching pursuant to Section 251 of the 1996 Telecom Act with its TELRIC based pricing requirements. Sprint further states that it is not requesting the TRA to determine which pricing standard would be appropriate for any offering of DS1 enterprise switching outside of its Section 251 obligations.

On July, 25, 2005, Sprint filed the *Response of United Telephone-Southeast, Inc to The Information Bureau's Response of July 12, 2005 and Modified Response of July 18, 2005*. Sprint reiterated that it is seeking to consolidate TRA Docket Nos. 05-00152 and 05-00156 because both dockets arise from the same legal issue. According to Sprint, TIB does not allege that the issues raised by both parties arise from different legal issues, only that the parties disagree on the conclusion as to the rights and obligations of the parties related to the continued provision of DS1 switching by Sprint. Sprint argues that consolidation of the dockets will not preclude either party from setting forth their positions but will promote the efficient use of resources of the

⁵ Also during the July 11, 2005 Authority Conference, the panel assigned to Docket No. 05-00156 voted unanimously to appoint a Hearing Officer to resolve preliminary matters, including the motion for consolidation and request for intervention, and prepare the matter for hearing by the panel. See Transcript of Authority Conference, pp. 42-44 (July 11, 2005).

⁶ See Transcript of Authority Conference, pp. 28-33 (July 11, 2005).

⁷ *TIB's Modified Response*, p. 3 (July 18, 2005).

parties and the Authority. Sprint also disagrees with TIB's claims that the issue of whether ILECs are required to provide DS1 switching is pending before the federal courts and that the provision of DS1 switching is subject to a transition period until March 11, 2006. Finally, Sprint notes that TIB has failed to serve any of its filings on Sprint as required by Tenn. Comp R & Regs. 1220-1-1-03(2).

FINDINGS AND CONCLUSIONS

The TRA is expressly authorized to hear requests for declaratory rulings pursuant to Tenn. Code Ann. § 65-2-104 (2004) and under the procedure set forth in the Uniform Administrative Procedures Act ("UAPA") at Tenn. Code Ann. § 4-5-223 (1998). Tenn. Code Ann. § 65-2-104 (2004) provides that upon a petition filed by an interested party,

...the authority may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it or with respect to the meaning and scope of any order of the authority.

Tenn. Code Ann. § 4-5-223 (1998) provides, in part:

(a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency. The agency shall:

(1) Convene a contested case hearing pursuant to the provisions of this chapter and issue a declaratory order which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided for by statute, in the manner provided for the review of decisions in contested cases; or

(2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in § 4-5-225

(b) A declaratory order shall be binding between the agency and parties on the state of facts alleged in the petition unless it is altered or set aside by the agency or a court in a proper proceeding.

(c) If an agency has not set a petition for a declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be

deemed to have denied the petition and to have refused to issue a declaratory order.

TRA Rules also provide for the filing of requests for declaratory orders or rulings Tenn. Comp. R. & Regs. 1220-1-2-.05(1) states:

Pursuant to T.C.A. §§ 4-5-223 and 65-2-104, any affected person may petition the Authority for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the Authority.

The Authority has “practically plenary authority over the utilities within its jurisdiction.”⁸ Tenn. Code Ann. § 65-4-104 (2004) charges the TRA with “general supervisory and regulatory power, jurisdiction, and control over all public utilities.” The TRA’s statutory authority must be liberally construed and “any doubts as to the existence or extent of a power conferred on the [TRA] . . . shall be resolved in favor of the existence of the power, to the extent that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction . . .”⁹

In exercising the powers conferred upon it by both the General Assembly and the federal government,¹⁰ the Authority is frequently called upon to interpret and enforce the applicability of federal statutes, orders and rules in regard to the public utilities over which it has been granted jurisdiction. Therefore, the Hearing Officer finds that the issue to be determined in this docket is one that concerns the applicability of a statute or rule enforceable by the Authority. The Hearing Officer further finds that the applicability of the statute, rule or order at issue is one within the primary jurisdiction of the Authority. Thus, the Hearing Officer concludes that the issue

⁸ *Tennessee Cable Television Ass’n v. Tennessee Public Service Comm’n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992)


⁹ *BellSouth Advertising and Publishing Corp. v. Tennessee Reg. Auth.*, 79 S.W.3d 506, 512 (Tenn. 2002), *cert denied*, 537 U.S. 1189, 123 S.Ct. 1256 (2003). See also *In re Petition of US LEC Tennessee, Inc. for Declaratory Order*, TRA Docket No. 02-00890, *Initial Order on Jurisdiction*, p. 6 (April 3, 2003)

¹⁰ See, e.g., 47 U.S.C. § 252

presented for a declaratory ruling is appropriately before the Authority and that a contested case should be convened in this matter. In addition, the Hearing Officer finds that the issue presented in TRA Docket 05-00156 is substantially similar to the issue in this docket and that both parties and the TRA would be well served by consolidating the two dockets. Therefore, the Hearing Officer concludes that the *Motion of United Telephone-Southeast, Inc to Consolidate Docket No. 05-00156 with Docket No. 05-00152* should be granted.

IT IS THEREFORE ORDERED THAT:

1. A contested case is convened in Docket No. 05-00152 and a Hearing shall be tentatively set for October 10, 2005, subject to approval by the panel;
2. TRA Docket Nos. 05-00152 and 05-00156 are consolidated. This Order shall also be filed in Docket No. 05-00156 and Docket No. 05-00156 shall be deemed closed after this Order becomes final. The record in Docket No. 05-00156 shall be a part of the record in Docket No. 05-00152 and all future filings shall be entered under Docket No. 05-00152;
- 3 The parties are directed to jointly file a proposed procedural schedule on or before August 9, 2005; and
4. Any party aggrieved by the Hearing Officer's decision in this matter may file a petition for reconsideration within fifteen (15) days from and after the date of this Order


Jean Stone, Counsel
as Hearing Officer